Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Wireless Telecommunications Bureau Invites	)	DA 11-558
Comment on Draft Environmental Notice	)	WT Docket No. 08-61
Requirements and Interim Procedures Affecting the	)	WT Docket No. 03-187
Antenna Structure Registration Program	)	

COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby responds to the Federal Communications Commission's Public Notice, dated March 25, 2011, seeking comments on draft rules and interim procedures designed to ensure that the environmental effects of communications towers, including their effects on migratory birds, are considered prior to construction. The draft rules and procedures respond to the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy, Inc. v. FCC,*[1] finding that the FCC's current antenna structure registration (ASR) procedures fail to offer members of the public a meaningful opportunity to review towers for environmental impacts before the ASRs are granted.

Verizon Wireless understands that the Commission must adopt rules allowing for advance notice of ASR application filings in order to comply with the mandate in *American Bird Conservancy*. However, the rules and procedures as drafted will impose significant burdens and delays on wireless facilities siting – including wireless broadband facilities – in conflict with Commission policies and goals. Verizon Wireless believes that there are ways to amend the

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[1] 516 F.3d 1027 (D.C. Cir. 2008) ("*American Bird Conservancy*").

draft rules that will comply with the mandate while decreasing the burden and lessening the delays imposed on wireless facilities. In particular, the Commission should (1) amend the draft rules to exclude towers under 351 feet tall from the environmental notification process as recommended in the Memorandum of Understanding[2] entered into by the Infrastructure Coalition and the Conservation Groups; (2) amend the draft rules to exclude towers under 200 feet in height that are not marked or lit from the environmental notification process; (3) amend the draft rules to shorten the public notice period to 15 days and adopt time frames for when the Commission will act on ASR applications; (4) increase its staff to handle the significant influx of work associated with the proposed rules; (5) take steps to eliminate the need for duplicative local public notices and to exclude facilities that have been reviewed by the United States Fish and Wildlife Service (USFWS) for impacts to migratory birds from the new ASR notice and review process; and (6) clarify that licensing applications that are not related to a pending ASR will not be held up until the ASR is granted.

I. THE COMMISSION SHOULD EXCLUDE ASRS FOR TOWERS UNDER 351 FEET TALL FROM THE ADVANCE PUBLIC NOTICE REQUIREMENT.

Under the draft interim rules and procedures proposed in the Public Notice, the Commission will require, with a few exceptions, applicants for ASRs to provide local public notice of the new or modified antenna structure and national notice of the application to be placed on the FCC's website for a period of 30 days. During that 30 day notice period, any

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[2] Memorandum of Understanding Concerning Interim Antenna Structure Registration Standards, submitted May 14, 2010 ("ASR MOU"). The MOU was signed by the Infrastructure Coalition, consisting of CTIA, the National Association of Broadcasters, PCIA, and the National Association of Tower Erectors, and by the Conservation Groups, consisting of the American Bird Conservancy, Inc., Defenders of Wildlife, and the National Audubon Society.

interested party may submit a petition to deny the application alleging a significant impact on the quality of the human environment.

Today, ASRs are processed and granted typically within 24 hours. As such, the proposed environmental notification process will impose delays of more than 30 days for almost every tower or modification requiring an ASR. These delays will directly impact wireless broadband facilities siting, in direct conflict with to the Commission's stated policies and goals in both the National Broadband Plan – which concluded that the rates, terms and conditions of access to rights of way significantly impact broadband deployment[3] -- and the recent broadband deployment Notice of Inquiry – which seeks to expand the reach and reduce the cost of broadband deployment by improving government policies for access to rights of way and wireless facilities siting.[4]

Particularly troubling is the fact that the Commission's proposed rules depart significantly, without explanation, from the ASR MOU filed jointly by the Industry Coalition and the Conservation Groups, which recommended that only ASRs for towers over 350 feet in height be put on public notice. More than 85 percent of the almost 9000 ASRs Verizon Wireless currently holds are for towers under 351 feet tall. Thus, by departing from the ASR MOU and requiring public notice for almost every ASR, the Commission's proposal will drastically

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[3] National Broadband Plan at 113. The term rights of way has been interpreted by the Commission to include all procedural and administrative requirements associated with access to and use of rights of way or wireless facilities siting.

[4] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, FCC 11-51, WC Docket No. 11-59 (released April 7, 2011) ("Broadband Acceleration NOI") at 1.

increase the number of towers that will be delayed by the new environmental notification process.

To remedy this situation, Verizon Wireless recommends that the Commission amend Section 17.4(c)(1) of the proposed rules to exclude towers under 351 feet tall from the environmental notification process. Should the Commission determine that it cannot address the Court's mandate at this time without requiring notice for towers under 351 feet in height, then it should both explain its rationale in making that determination and move quickly to conclude the Programmatic Environmental Assessment process[5] with an eye towards determining that towers below 351 feet (or some other height that can be demonstrated not to impact migratory birds) do not impact migratory birds so that such towers can be excluded from the notification process.

II. THE COMMISSION SHOULD EXCLUDE TOWERS UNDER 200 FEET TALL THAT ARE NOT MARKED OR LIT FROM THE ENVIRONMENAL NOTIFICATION PROCESS.

If the Commission does not exclude towers under 351 feet in height from the environmental notification process, it should, at minimum, exclude towers under 200 feet in height that are not marked and lit from the notification requirement. Although the proposed rules would create a handful of exceptions to the advance public notice requirement, towers that are under 200 feet tall and are not required to be marked and lit are not excluded. Verizon Wireless submits many ASR applications for towers in this category. For example, if a tower fails the Section 17.7(b) slope tests, but is determined by the FAA not to require marking or lighting, it

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[5] *See* Public Notice, Federal Communications Commission Announces Public Meetings and Invites Comments on the Environmental Effects of its Antenna Structure Registration Program, WT Docket No. 08-61, WT Docket No. 03-187, DA 10-2178, released November 12, 2010.

must still be registered by the applicant.[6] Such towers, however, present no significant threat to the environment[7] and should therefore be excluded from the advance public notice requirement.

III. THE COMMISSION SHOULD SHORTEN THE TIME FOR PUBLIC NOTICE TO FIFTEEN DAYS AND ADOPT TIMEFRAMES FOR COMMISSION ACTION ON ASRS.

The Commission can also reduce the dilatory impact that the proposed rules will have on wireless facilities siting by reducing the time period for accepting public comment to 15 days, by making clear that once that time period has expired no additional filings will be considered, and by setting forth timeframes for granting ASRs that are not challenged and for acting on ASRs for which a request for environmental processing ("REP") is filed.

In mandating that the Commission amend its procedures to provide advance public notice of individual tower applications, the Court in *American Bird Conservancy* did not mandate any particular time period for that public notice and, indeed, noted that the Commission enjoys wide discretion in fashioning its own procedures.[8] As such, the Commission has considerable discretion to balance the need to provide advance notice with its stated goals of speeding wireless facilities siting. Verizon Wireless believes that a 15-day comment period would both satisfy the Court's mandate and strike a better balance than the proposed 30-day public notice period. Given that the notice period does not begin until after the FCC provides national notice, and national notice will not occur until after local notice is provided, 15 days should be more than adequate to ensure that interested parties have the opportunity to comment.

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6 47 C.F.R. § 17.7(b).

7 Indeed, the MOU determined that towers no greater than 350 feet in height do not, on their face, present avian concern issues. ASR MOU at 3.

8 *American Bird Conservancy,* 516 F.3d at 1035.

There are several other steps the Commission should take to reduce the delays associated with the new ASR processes. First, it should clarify that once the public notice period concludes, no additional comments or REPs will be accepted or considered. This step is necessary to ensure that applications can be processed and acted upon in a timely manner.

Second, the Commission should impose timelines on itself for acting on ASRs once the public notice period has closed. In particular, given that today the Commission grants most ASRs within 24 hours, the Commission should commit to granting ASRs that are not challenged within 24 hours of the expiration of the public notice period. For applications that are challenged, the Commission should commit to determining if an environmental assessment (EA) is required within 15 days of the close of the public notice period. Finally, if an EA is filed, the Commission should commit to either rendering a Finding of No Significant Environmental Impact (FONSI) or notifying the applicant that the proposal may have a significant environmental impact within 30 days after the public comment period for the EA expires.

These measures are necessary to ensure prompt Commission processing of ASR applications and associated EAs so that carriers may move forward in a timely manner to construct wireless facilities.

IV. THE COMMISSION SHOULD INCREASE ITS STAFF TO BE ABLE TO PROCESS ASR APPLICATIONS AND ACT UPON ASSOCIATED ENVIRONMENTAL PROCESSING.

Another factor impacting how quickly applicants can move applications through the new ASR process is the level of staffing at the Commission dedicated to processing ASR applications. As noted above, the proposed rules will require the Commission to receive public comments on the environmental impact of proposed wireless facilities, review those comments,

make determinations regarding whether an EA is required, and determine whether the proposed facility will impact the environment.

Verizon Wireless has experienced delays in resolving previous environmental issues at the FCC. On two separate occasions, tower construction was delayed by more than a year as the Commission deliberated alleged historic preservation impacts of proposed towers. Based on this experience, the company is concerned that wireless facilities siting will bog down as the Commission is faced with dozens if not hundreds of ASR challenges each year. To avoid delays, therefore, the Commission should increase staff assigned to process, review and resolve ASR application challenges. In addition, the Commission should hire a certified biologist to be able to render decisions regarding whether a proposed facility will significantly affect migratory birds in a timely manner.

V. THE COMMISSION SHOULD CONSIDER STEPS TO REDUCE REDUNDANT NOTIFICATIONS AND EA FILINGS.

The proposed interim rules and procedures appear to envision a new and separate public notice and EA filing requirement for ASRs. The rules and procedures do not appear to consider or harmonize these requirements with existing notice and EA filing requirements.

With respect to public notice, the Nationwide Programmatic Agreement (NPA) requires applicants to provide local public notice of a proposed project before submitting the project for State Historic Preservation Officer or Tribal Historic Preservation Officer review.[9] In addition, applicants for local zoning permits and approval typically must provide public notice as part of the local zoning process. Adding yet another local public notice requirement to these existing

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[9] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 C.F.R. Part 1, Appendix C, § V.

requirements is burdensome and will likely create confusion among interested parties regarding their rights associated with each notice. To rectify this situation, the Commission should consolidate the public notice requirements. In particular, the Commission should allow applicants to combine the NPA and ASR local public notice into one notice provided that such notice meets the requirements set forth for each process.

With respect to EAs, the draft rules and procedures do not appear to consider that applicants may already be preparing and filing EAs for migratory bird or other impacts associated with ASRs. Verizon Wireless, for example, already considers migratory bird impacts in its environmental reviews and consults with the USFWS for most projects requiring ASRs. If the USFWS determines that a tower may significantly impact migratory birds, threatened or endangered species, or critical habitats, and that impact cannot be resolved by amending the project, Verizon Wireless formally consults with the USFWS to undertake approved mitigation measures and, with USFWS concurrence, prepares and files an EA with the FCC. The process of consulting with the USFWS and EA review can take a year or more to conclude.

The process proposed by the Commission does not appear to consider that migratory bird impacts may already have been considered by the expert agency for migratory birds or that an EA may already have been filed – providing both the Commission and the public with an opportunity to comment on the environmental impacts of the proposed site. As such, it appears that an applicant that has already vetted a project with the USFWS would still be required to provide public notice for the project and possibly be required to file an additional or amended EA to consider migratory bird or other environmental impacts based on comments received during the ASR public notice period. To remedy this situation and avoid duplicative, dilatory and unnecessary review processes, the Commission should include an exception in Section

17.4(c)(1) of the proposed rules for towers that have been reviewed for migratory bird impacts by the USFWS, provided that any finding of a significant impact on the environment associated with the facility has been resolved, either by amending the project or filing an EA.

VI. THE COMMISSION SHOULD NOT HOLD UP LICENSE APPLICATIONS FOR COLLOCATIONS WHERE A PENDING ASR IS NOT RELATED TO THE FACILITY BEING LICENSED.

The draft rules and procedures appear to state that license applications will not be processed until the ASR review and approval process is complete.[10] While this requirement makes sense for a new tower that requires an ASR and for tower modifications that are necessary to accommodate the facility being licensed, there are circumstances where the ASR and license application are not related. Thus, for example, in some cases an applicant may be collocating a facility (such as a microwave facility) that must be licensed on a tower that has an ASR application pending. The pending ASR, however, may not be related at all to the facility being licensed (such as when the tower owner is changing the tower lighting system or increasing the tower height to accommodate a different collocator at the top of the tower). In such cases, it does not make sense to hold up the licensing application for the facility that does not create the need for the ASR until the ASR review process is completed. The Commission should therefore clarify that license applications that do not create the need to file an amended ASR or are not related to the ASR modification will not be delayed until the ASR process is completed.

VII. CONCLUSION

Verizon Wireless understands that the Commission must adopt rules allowing for advance notice of ASR application filings in order to comply with the Mandate in *American Bird*

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[10] *See* proposed rule Section 1.923(d) and 1.934(g).

Conservancy. However, the Commission should adopt more streamlined rules than what it has proposed. Making the changes discussed above will fully satisfy the Court's mandate while not unnecessarily injecting new delays and burdens on the siting process – delays and burdens that would be antithetical to the Commission's goals for deploying wireless broadband.

Respectfully submitted,

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